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SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1931.

No. 98

OZIE POWELL, WILLIE ROBERSON, ANDY WRIGHT, OLEN MONTGOMERY, EUGENE WILLIAMS, PETITIONERS,

vs.

THE STATE OF ALABAMA.

No. 99

HAYWOOD PATTERSON, PETITIONER,

vs.

THE STATE OF ALABAMA.

No. 106

CHARLIE WEEMS AND CLARENCE NORRIS, PETITIONERS,

vs.

THE STATE OF ALABAMA.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

THOMAS E. KNIGHT, JR.,
Attorney General of the State of Alabama;
THOMAS SEAY LAWSON,
Assistant Attorney General of the State of Alabama,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

Nos. 981, 982 and 983

OZIE POWELL, WILLIE ROBERSON, ET AL.,
PETITIONERS,

vs.

THE STATE OF ALABAMA.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF IN OPPOSITION.

Opinion Below.

This case was appealed from the Circuit Court of Jackson County, Alabama. The Supreme Court of Alabama, in an opinion March 24, 1932, affirmed the judgment of the Circuit Court of Jackson County. The opinion is found on page 145 of the record.

Questions Presented.

I.

Whether or not the defendants were accorded a fair and impartial trial and were convicted by due process of law.

II.

Whether or not the accused were provided with counsel.

III.

Whether or not negroes, the defendants being of the negro race, were systematically excluded from the juries.

In short the defendants base their contention for review by this Court upon the question of whether or not their constitutional rights under the Constitutions of the State of Alabama and of the United States were violated, asserting that they were not convicted by due process of law nor were they extended equal protection of law in that,

1. There were hostile demonstrations at the scene of the trial.

2. They should have been granted a change of venue.

3. The case should have been continued.

4. They were not provided with counsel.

5. Negroes were excluded from the juries.

Statement of the Case.

The petitioners were indicted in the Circuit Court of Jackson County, Alabama, and were charged in said indictment with the offense of rape. The victim was Victoria Price, a white woman, who lived near the City of Huntsville, Alabama, and who at the time of the commission of the offense was riding on a freight train between Stevenson and Paint Rock in Jackson County, Alabama. The trial of the petitioners was had in the Circuit Court of Jackson County on April 8, 1931, and resulted in the conviction of these petitioners, then defendants, of the offense of rape as charged in the indictment. The death penalty was imposed and on April 9, 1931, each of the defendants was sentenced to death in accordance with the verdict of the jury. These sentences were suspended pending an appeal to the Supreme Court of the State of Alabama and were by that Court affirmed on the 24th day of March, 1932.

There was no motion made by the defendants or either of them to quash the indictment in this cause, neither was there a motion made for a continuance of the cause by the defendants or either of them.

Counsel to represent them at the arraignment and at the trial of the cause were duly appointed by the trial court which counsel did, at the arraignment and during the trial of the cause, represent the defendants according to their oath and in the discharge of their duty.

Motion was made for a change of venue in the cause, which said motion appears on page 4 of the printed record in this cause.

The motion for a change of venue was by the trial court overruled, the order overruling said motion appears at page 21 of the printed record of this cause.

After the verdict of the jury and sentence of the Court a motion was made for a new trial, which said motion was twice amended. Said motion, as amended, appears on pages 53, 54 and 109 of the printed record in this cause, which said motion, as amended, after having been heard and considered by the Court was overruled, the order overruling said motion appears at page 137 of the printed record in this cause.

The petitioners seek a review by this Court of the findings and proceedings in the trial court as affirmed by the Supreme Court of the State of Alabama.

ARGUMENT.

I.

THE TRIAL OF THIS CAUSE WAS FAIR AND IMPARTIAL AND THE SENTENCE OF THE COURT DOES NOT CONSTITUTE A DEPRIVATION OF LIFE AND LIBERTY WITHOUT DUE PROCESS OF LAW IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The case of *Moore* v. *Dempsey,* 261 U. S. 86, is not an authority for a review by certiorari of the proceedings and findings of the trial court, affirmed by the Supreme Court of the State of Alabama.

In the Moore case referred to by the petitioners, the facts urged in the petition were by the pleadings

admitted, when counsel for the State demurred to the petition for *habeas corpus.*

The admission of the allegations of the petitioners formed the basis of the opinion of Mr. Justice Holmes, as very positively stated by him.

When the same case was presented to this Court by a petition for writ of certiorari the writ was denied. *Frank Moore et al.* v. *State of Arkansas,* 254 U. S. 630.

In the present case none of the facts urged in the petition before this Court are admitted but on the contrary the trial court found them to be different than alleged and his findings have been affirmed by the Supreme Court of the State of Alabama.

The Moore case is only an authority for the petitioners' contention where those facts were admitted.

This Court is asked to review a ruling of a *nisi prius* court, who saw and heard the witnesses and evidence, had intimate knowledge of the conditions existing at the time of the trial and whose rulings have in all respects been affirmed by the court of last resort of the State of Alabama.

(*a*) The question as to the conditions existing at the time of the trial was presented in the defendants' motion for a change of venue and was reviewed, as a ground incorporated in the motion for new trial, by the Supreme Court of the State.

The offense committed was one calculated to arouse the curiosity of all persons in the community. It is true that there were a number of persons present when the defendants were tried and when they were arrested. It is also true that there were several news-

paper articles relative to the offense. It is also true that the military were present. However, the same was not judicially determined to be necessary to protect the defendants from violence. The military was summoned because the sheriff of the county was a cautious official and desired to accord the defendants an orderly trial. The newspaper articles did not encourage mob violence nor did they intimate that there should in any sense of the word be a miscarriage of justice. Furthermore, the record does not show that the circulation of the papers had aroused the populace unduly. It is true that the defendants were not residents of Jackson County, but it is also true that the victims were not residents of Jackson County.

The witnesses on a motion for change of venue offered by the defendants each testified that there had been no hostile demonstrations towards the accused. The Supreme Court of Alabama after a careful review of the facts properly decided that the conditions existing at the time of the trial did not warrant the granting of the motion and cited in support of their decision the cases of

Godau v. *State*, 179 Ala. 27, 60 So. 908.
McLain v. *State*, 182 Ala. 67, 62 So. 240.
Malloy v. *State*, 209 Ala. 219, 96 So. 57.

The Supreme Court of Alabama in its opinion found that the facts in the case of *Moore* v. *Dempsey*, 261 U. S. 86, did not resemble in the remotest degree any of the facts and circumstances that attended the trial of these petitioners.

(*b*) The record in the case duly discloses that the defendants were at the time of the trial and at the arraignment represented by counsel.

Counsel for the petitioners criticize the manner in which counsel who represented the petitioners at the trial conducted the case. The strategy used by counsel in the opinion of subsequently employed counsel cannot be made a basis of granting the writs prayed for in this cause. For aught that appears from the record, the counsel for the defendants on trial did not desire to continue the cause for no motion was made for a continuance. Whether this was proper strategy is not for this Court to decide. *Henry Ching* v. *United States*, 264 Fed. 639; certiorari denied, 254 U. S. 630.

II.

NEGROES WERE NOT SYSTEMATICALLY EXCLUDED FROM JURIES IN JACKSON COUNTY.

The jury laws of the State of Alabama provide that all male citizens, without regard to race or color, possessing certain other qualifications, shall be included in the jury rolls of a county. General Acts, State of Alabama, 1931, page 59.

The record fails to show that negroes were not included on the jury rolls of Jackson County. The record also shows that a motion was not made at the trial of the cause to quash the venire on this or any other grounds. It is only fair to assume that the defendants were satisfied with the venire as the same was constituted and that they desired to be tried by a jury selected therefrom.

In the absence of a motion to quash and evidence in the support thereof the question is not here presented for review. *Thomas* v. *Texas,* 212 U. S. 278. *Ex parte Virginia,* 100 U. S. 313. *Martin* v. *Texas,* 200 U. S. 316. *Smith* v. *Mississippi,* 162 U. S. 592. *Ragland* v. *State,* 56 So. 776 (and Ala.).

Summarizing, the evidence in the case was amply sufficient and convincing to warrant the conviction of these defendants and the punishment imposed by the jury and Court. The defendants had a fair and impartial trial. They were represented by counsel. They were not threatened with mob violence. The trial proceeded orderly and it is fair to assume that the defendants were satisfied with the conduct of the trial and with the order preserved, as the record discloses no motions were made by the defendants' counsel to declare a mistrial or discontinuance of the case.

A motion for a new trial was made, to which the Supreme Court of Alabama held the defendants were not entitled. The matters alleged in the motion were had and done within the presence of the Court and he, having an intimate knowledge of the facts happening in his presence, properly overruled the motion for a new trial on account of the alleged applause when a verdict was rendered in one of the companion cases.

Counsel of ability known to the Supreme Court of Alabama represented the defendants in the trial.

Under the system of laws of the State of Alabama and under the Constitution of the State a defendant is accorded means of obtaining a fair and impartial trial according to the Constitution of the United States.

In short, the petitioners in this cause would ask this Court to substitute itself for the trial court and for the Court of last resort of the State of Alabama and grant writs of certiorari on questions of fact presented to the trial court for original decision and to the Supreme Court of Alabama for review.

While the facts in this case have been found not to resemble the facts in the Frank Moore case, *supra,* in any sense of the word or to approach the facts in that case in the remotest degree, yet counsel for the petitioners ask this Court to recede from the decision in the case of *Frank Moore* v. *State of Arkansas,* 254 U. S. 630, wherein this Court took the position that the defendant was not entitled to the writ of certiorari.

Respectfully submitted,

THOMAS E. KNIGHT, JR.,
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THOMAS SEAY LAWSON,
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